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Report of the Secretary-General on the implementation of the decision of the Council in 2017 relating to the summary report of the Chair of the Legal and Technical Commission

Information relating to compliance by contractors with plans of work for exploration

Report of the Secretary-General

I. Introduction

1. In paragraph 12 of its decision ISBA/23/C/18, dated 15 August 2017, the Council requested the Secretariat and/or the Legal and Technical Commission to provide further details on cases of non-compliance in circumstances in which the relevant contractor had not complied with a specific request in a letter received from the Secretary-General, including details regarding the relevant contractor, details with respect to repeated instances of non-compliance and recommendations to ensure compliance in the future, to enable the Council to discharge its functions under article 162, paragraph 2, of the United Nations Convention on the Law of the Sea.

2. That decision was taken in response to the report of the Chair of the Legal and Technical Commission on the work of the Commission in 2017, in which it was noted that there had been some cases of non-compliance with regard to reporting requirements (ISBA/23/C/13, sect. D, paras. 15 (c–h)).

3. The purpose of the present report is to provide the Council with relevant background information on the issue of monitoring compliance with plans of work for exploration, including a review of the relevant rules, regulations and procedures of the Authority, and the related responsibilities of the Council, the Legal and Technical Commission and the secretariat. Recommendations are made with a view to improving the Council's ability to discharge its functions under article 162, paragraph 2, of the Convention.

* ISBA/24/C/L.1.

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II. Monitoring compliance

4. Under article 162, paragraph 2 (l), of the Convention, the Council shall exercise control over activities in the Area in accordance with article 153, paragraph 4, of the Convention and the rules, regulations and procedures of the Authority. Under article 153, paragraph 4, the Authority is required to exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of part XI of the Convention and the annexes relating thereto, and the rules, regulations and procedures of the Authority, and the approved plans of work.

5. Monitoring compliance with plans of work for exploration approved in the form of contracts is also one of the functions of the Authority pursuant to section 1, paragraph 5 (c), of the annex to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Agreement). At present, the primary monitoring mechanisms available to the Authority are the annual reports submitted by contractors pursuant to section 10 of the standard clauses for exploration contracts and the periodic reviews of the plans of work for exploration under section 4.4 of the standard clauses. In due time, the Council will be required to establish an appropriate inspection mechanism pursuant to article 162, paragraph 2 (z), of the Convention. Although such an inspection mechanism does not exist at present, it is expected that the establishment thereof will be addressed in the context of the exploitation regulations.

6. The plan of work for exploration is the fundamental document by which a contractor sets out the objectives of its proposed exploration programme. Pursuant to the regulations on prospecting and exploration, the plan of work for exploration comprises a general description and a schedule of the proposed exploration programme, including the programme of activities for the immediate five-year period, as well as a description of a programme for oceanographic and environmental baseline studies, taking into account any recommendations issued by the Commission, a preliminary environmental impact assessment of the proposed exploration activities and a schedule of expected yearly expenditure in respect of the programme of activities. Upon approval of the plan of work by the Council, the programme of activities for the immediate five-year period becomes schedule 2 of the contract for exploration. Under the contract, the contractor is required to submit an annual report to the Secretary-General within 90 days of the end of each calendar year covering its programme of activities in the exploration area (sect. 10.1 of the standard clauses). The report must be in the format recommended from time to time by the Commission.

7. Under sections 4.1 and 4.2 of the standard clauses, the contractor is required to adhere to the time schedule stipulated in its programme of activities and to spend in each contract year no less than the amount specified in the programme. The programme of activities, including expenditure, may be modified by a contractor with the consent of the Authority, insofar as any changes may be necessary and prudent in accordance with good mining industry practice, taking into account the market conditions for the constituent metals and other relevant global economic conditions.

8. In accordance with section 4.4 of the standard clauses, the contractor and the Secretary-General shall jointly undertake a review of the implementation of the plan of work for exploration. The Secretary-General may require the contractor to submit such additional data and information as may be necessary for the purposes of the review. Following the review, the contractor is required to make any necessary adjustments to its plan of work and to indicate its programme of activities for the following five years, including a revised schedule of expected yearly expenditure. Schedule 2 of the contract is then adjusted accordingly.

9. In carrying out its programme of activities, the contractor must implement, as far as reasonably practicable, any recommendations that may be issued from time to time by the Commission. The ability of the contractor to implement such recommendations, however, will primarily be linked to the specific programme of activities to which the contractor has committed itself under schedule 2 of the contract. Environmental baseline data, for example, would be collected as exploration activities progress and develop (sect. 5.2 of the standard clauses).

III. Role of the organs of the Authority

10. The various organs of the Authority have specific and clearly defined roles and responsibilities in relation to monitoring compliance with plans of work for exploration, which are derived from the Convention, the 1994 Agreement, the regulations and the standard clauses for exploration contracts.

11. The responsibilities of the Secretary-General are to:

(a) Review annual reports of contractors and require contractors to submit additional data and information as necessary (sect. 10 of the standard clauses);

(b) Submit data and information from environmental monitoring programmes to the Commission for consideration pursuant to article 165, paragraph 2 (d), of the Convention;

(c) Agree on adjustments to the programme of activities under schedule 2 of the contract (sect. 4.3 of the standard clauses);

(d) Jointly undertake a periodic (five-year) review of the implementation of the plan of work for exploration and agree on a revised schedule 2 (sect. 4.4 of the standard clauses);

(e) Inspect vessels and installations (sect. 14.2 of the standard clauses), and provide relevant information to the contractor and sponsoring State(s) arising from the inspection reports (sect. 14.7 of the standard clauses);

(f) Report incidents giving rise to emergency orders and take immediate temporary measures (regulation 33);[1]

(g) Notify member States of the termination or change of sponsorship (regulation 29).

12. The functions of the Legal and Technical Commission are set out in article 165, paragraph 2, of the Convention and are closely related to the functions of the Council under article 162. The system is designed to ensure that, in making decisions on important issues, the Council acts on the basis of the best available scientific and legal advice. The obligations placed on the Commission are mainly of an advisory or recommendatory nature and fall into the following four broad functional categories:

(a) Reviewing and making recommendations on plans of work for exploration (art. 165, para. 2 (b));

(b) Supervising activities in the Area (art. 165, paras. 2 (a, c, i, j, k and m));

(c) Formulating and reviewing rules, regulations and procedures (art. 165, paras. 2 (f and g));

[1] For the purposes of the present report, reference is made to the regulations on prospecting and exploration for polymetallic nodules in the Area (ISBA/19/C/17, annex).

(d) Assessing the environmental implications of activities in the Area (art. 165, paras. 2 (d, e, h and l).

13. Two of the general functions of the Commission under article 165 are directly related to the implementation of plans of work for exploration, namely, the responsibilities, under article 165, paragraph 2 (c), to supervise, upon the request of the Council, activities in the Area and, under article 165, paragraph 2 (d), to prepare assessments of the environmental implications of activities in the Area.

14. Consistent with article 165, paragraph 2, the regulations empower the Commission to issue recommendations of a technical or administrative nature for the guidance of contractors to assist them in the implementation of the rules, regulations and procedures of the Authority. Under the standard clauses, the contractor is required to observe those recommendations as far as reasonably practicable in carrying out their programmes of activities.

15. In order to enable the Commission to carry out its responsibility to prepare assessments of the environmental implications of activities in the Area pursuant to article 165, paragraph 2 (d), and make appropriate recommendations to the Council on the protection of the marine environment, data and information from environmental monitoring programmes submitted by contractors must be transmitted by the Secretary-General to the Commission (regulation 32, para. 2).

16. The Commission must also consider the reports of the Secretary-General on the periodic reviews of the implementation of plans of work for exploration (regulation 28, para. 3).

17. The functions of the Council are to:

(a) Approve plans of work in accordance with paragraph 11 (a) in section 3 of the annex to the 1994 Agreement;

(b) Consider the reports of the Secretary-General on the periodic reviews of the implementation of plans of work for exploration (regulation 28, para. 3);

(c) Invite the attention of the Assembly of the Authority to cases of non-compliance (art. 162, para. 2 (a));

(d) Exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority (art. 162, para. 2 (l));

(e) Institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance (art. 162, para. 2 (u));

(f) Establish appropriate mechanisms for directing and supervising a group of inspectors who shall inspect activities in the Area to determine whether part XI of the Convention, the rules, regulations and procedures of the Authority and the terms and conditions of any contract with the Authority are being complied with (art. 162, para. 2 (z));

(g) Suspend or terminate contracts if, in spite of written warnings from the Authority, a contractor has conducted its activities in such a way as to result in serious persistent and wilful violations of the fundamental terms of the contract, part XI of the Convention, the 1994 Agreement and the rules, regulations and procedures of the Authority;

(h) Alternatively, or in the event of lesser violations, impose monetary penalties upon a contractor proportionate to the seriousness of the violation.

IV. Consequences of non-compliance

18. Non-compliance denotes a failure or refusal to comply with a regulatory requirement and must be distinguished from inadequate or incomplete performance against an approved plan of work. Not every case of inadequate or incomplete implementation of a plan of work amounts to non-compliance.

19. Depending on the gravity of the failure or refusal, non-compliance may have serious consequences for contractors. For example, under section 21 of the standard clauses, the Council may suspend or terminate a contract or impose monetary penalties, as described in paragraphs 17 (g and h) above. In specified circumstances, outlined in regulation 24, non-compliance may lead to the withdrawal of the preference and priority accorded to contractors for exploration among applicants submitting plans of work for exploitation of the same area and resources. To date, no enforcement action has been taken by the Council with respect to any contractor. No written warnings have been issued, and no monetary penalties have been imposed.

V. Cases of non-compliance noted by the Legal and Technical Commission in 2017

20. Based on the review of annual reports by the Commission, the issues referred to as non-compliance in the report of the Chair of the Commission may be categorized as follows:

(a) The failure to submit annual reports on time;

(b) The failure to follow recommended reporting formats and methodologies, including the failure to use reporting templates as recommended by the Commission;

(c) Reported delays in advancing activities under the plan of work.

21. In addition, there is a general concern that, in many cases, contractors' actual expenditure is lower than planned expenditure.[2]

VI. Discussion

22. A preliminary review of the issues referred to in paragraphs 20 and 21 above revealed that there is some confusion with regard to the difference between the monitoring of compliance against a plan of work, in the sense of a failure or refusal to comply with a regulatory requirement, and the monitoring of performance against the programme of activities. In view of the potential consequences of non-compliance (outlined in section IV above), it is important that the difference between those activities be well articulated and that the process for monitoring compliance and the responsibilities of the various organs of the Authority in relation thereto be clearly understood.

23. The annual reporting process and the quinquennial periodic review undertaken by the Secretary-General serve as important monitoring tools. They facilitate the measurement of the progress of the exploration work carried out on an annual basis against a contractor's approved plan of work, including its programme of activities, and serve to highlight proposed adjustments to that programme. The annual reporting process also provides the Authority with much needed data and information, for

[2] For 2016, reported expenditure was lower than planned expenditure in 12 cases. Percentages varied from 3 to 99 per cent. In four cases, expenditure was not reported in the format requested by the Commission.

example, to evaluate, analyse and assess the environmental effects of exploration activities, and to help the Authority to formulate relevant rules, regulations and procedures concerning the protection of the marine environment and safety. This is particularly important in connection with the data and information made available to the Commission to facilitate the fulfilment of its obligations under article 165, paragraph 2, of the Convention to provide guidance and recommendations to the Council.

24. Certain deficiencies in the current reporting process were highlighted in the final report on the periodic review of the International Seabed Authority pursuant to article 154 of the Convention, together with comments by the Secretary-General. Among the measures taken to date to improve efficiency are the establishment of a dedicated contract management unit to streamline internal processes and improve the flow of communication between contractors and the Authority, and a regular annual meeting of contractors at which issues of mutual concern can be discussed. The launch of the Authority's new database, scheduled for 2018, is expected to improve significantly the flow of data and information among contractors, the Secretary-General and the Commission. The new database will also result in greater transparency, with secure access to confidential data for authorized users, and an intuitive and informative website that includes a geographic information system for public access to non-confidential data and information. In addition, external visibility of the respective programmes of activities of contractors would also contribute to greater transparency and facilitate greater collaboration and cooperation among contractors.

25. A careful review of the relevant provisions of the Convention and the regulations revealed a clear separation of the functions in the organs of the Authority between licensing (approving plans of work in the form of contracts) and subsequent compliance with and enforcement of such contracts. For example, the function of directing and supervising an inspectorate, as well as taking enforcement action, rests exclusively with the Council. The day-to-day responsibility for managing the implementation of plans of work for exploration and for reporting any instances of non-compliance lies with the Secretary-General, who exercises the powers and functions allocated to that position in a manner consistent with the Convention and the regulations. An inherent conflict of interest exists when the body that approves contracts for exploration and the financial terms thereof is the same body that is responsible for ensuring compliance.

26. In terms of distinguishing non-compliance from inadequate or incomplete performance against an approved plan of work, a more effective validation process is needed to determine whether a matter identified as potential non-compliance is in fact a case of non-compliance with the regulations. Improvements to the current process are ongoing, but a clearer understanding as to why certain reporting requirements recommended by the Commission have not been met or fulfilled would improve the Authority's understanding of the programmes and timelines of contractors.

27. The Authority is in a transitional phase from managing and administering contracts for exploration activities in the Area, including the gathering of geological and environmental data, to its role as a future regulator of mining activities in the Area. One of the key principles of good international governance is transparency. In that regard, the current working draft of the exploitation regulations recognizes an exploitation contract, including the activities carried out thereunder, to be a public document, except for confidential information.

VII. Recommendations

28. The Council is invited to:

(a) Take note of the matters contained in the present report and consider requesting contractors to provide more information on the reasons for delays in implementing plans of work and for reductions in projected expenditure;

(b) Take note of the respective responsibilities of the Secretary-General, the Legal and Technical Commission and the Council in relation to the reporting of activities carried out under plans of work for exploration;

(c) Request the Secretary-General to provide an annual report to the Council identifying instances of alleged non-compliance and the regulatory action that is recommended or to be taken, including any monetary penalties to be imposed by the Council;

(d) Request the Secretary-General to include in his reports on the status of all contracts greater detail on the periodic review of implementation of plans of work for exploration in accordance with regulation 28;

(e) Request sponsoring States to provide details of any measures taken to ensure compliance under a contract for exploration, in accordance with article 139 of the Convention;

(f) Request the Secretary-General to explore with contractors the possibility of making contracts for exploration and associated programmes of activities publicly available, taking into account the confidentiality obligations under such contracts.